APPEAL NO. 93443

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts. 8308-1.01-11.10 (Vernon Supp. 1993) (1989 Act). A contested case hearing was held in (city), Texas, on May 6, 1993, to decide the issue of whether or not the respondent, hereinafter claimant, was an employee of (employer), when he was injured on (date of injury). The appellant, hereinafter carrier, appeals the determination of hearing officer (hearing officer) that the claimant was the employee of the employer when he was injured on January 11th in the course and scope of his employment. No response was filed by the claimant.

DECISION

We affirm the decision and order of the hearing officer.

With very few exceptions, the facts of this case are not in dispute. The claimant had worked as a laborer for (employer), a from October until December 1992. Because business was slow, he left employer around the end of the year and began working for another company in January of 1993. When he told employer's foreman, (Mr. E), that he was going to take another job he asked whether he could come back to employer if the new job did not work out. Both claimant and Mr. E testified at the hearing that Mr. E told him that he could.

The claimant had worked almost one week for the second company when he was told on Friday, January 8th, that his drug test had come back positive and that they were letting him go. That morning he said he went to employer and asked Mr. E if he could come back to work. He said they both went to talk to (Red) Self (Mr. S), the supervisor, who replied, "[c]ome back Monday morning and we'll see what we can do."

Claimant said he returned to employer's job site Monday, January 11th. He said Mr. E was already there, getting the forklift started, and that two other employees, Mr G and Mr G, showed up shortly thereafter. Claimant said Mr. E came over to the three men and said, "[w]e've got a trailer to unload." The claimant said he and the two other men got on the truck and began unloading, and Mr. E operated the forklift and moved the crates. About thirty minutes after the crew began working around 7:30, claimant said, he slipped off the back of the truck and fell to the ground; however, he got back on the truck and continued working until the truck was unloaded, a total period of about two hours. At that time, because it was raining, Mr. E told the crew that they were done for the day, and they went home.

The claimant said he called Mr. E that night to tell him that his back was hurting from the fall, and that he didn't know whether he would be able to come in to work the next day. The next day, however, claimant did return to work and began setting up the scaffolds that had been unloaded the prior day. That morning he said Mr. E came over to him and told him he had gotten him his job back. The claimant continued to work, and worked for about

a month before he had to quit because of back pain.

Mr. S, the superintendent, testified that he remembered Mr. E talking to him on Tuesday, January 12th, about claimant coming back to work, and he said he "supposed" Mr. E authorized claimant's rehire on that day; however, he said he did not remember talking to Mr. E and claimant the previous Friday, and he was not at the job site on Monday. When asked who was in charge of hiring, he said that "[m]ainly [Mr. E] takes care of all our paperwork," and that Mr. E "tells them they're hired."

Mr. E confirmed that claimant had left employer because things were slow, and that he had told claimant that if his new job didn't work out, he could come back. On Monday, January 11th, he said several laborers showed up; he said he could not remember his exact words, but that he had said they needed to unload the truck. At the hearing he said he had made this statement to V and R, although he acknowledged that he saw claimant on the truck working, and observed him fall from the truck then climb back on. He maintained at the hearing that he had not hired claimant back that morning, but also said he also did not tell claimant to leave.

Mr. E said that the following day claimant came back to employer's job site, and he and Mr. S determined that work was "picking back up" and they needed claimant to come back. At that point, Mr. E said he went to claimant and said, "[y]ou owe me one, I got your job back."

Employer's time sheets which were filled out by Mr. E reflect that Mr. E, , and R each worked two hours on January 11th, but do not show claimant as working that day. Claimant is shown as having worked 8-1/2 hours the following day. Claimant said he did not realize until the issue in this case arose that his paycheck did not include the two hours he worked on January 11th.

The hearing officer determined that a contract of employment existed between claimant and employer on January 11th, and accordingly claimant was an employee when he was injured on that date. In its appeal, the carrier contends that as a matter of law the hearing officer erred in finding that claimant was an employee at the time of injury since claimant's work that day was voluntary and because the employer had no right of control over claimant's work. The carrier also contends that the hearing officer erred in applying the facts to find that all the necessary elements of a contract had been established.

The 1989 Act defines "employee" in pertinent part as "each person in the service of another under any contract of hire, whether express or implied, oral or written." Article 8308-1.03(18). Likewise, "employer" is defined as "a person that makes a contract of hire . . . ." Article 8308-1.03(19). As noted by Professor Larson, the compensation concept of "employee" is narrower than that of the common law concept of "servant" in the respect that most statutes insist upon the existence of an express or implied contract of hire as an

essential feature of the employment relation. 1C Larson, Workmen's Compensation Law, §§ 47.00, 47.10.

Under the above reasoning, a gratuitous servant is not an employee, as the element of hire is lacking. As the court said in Texas Employers Insurance Association v. Burrell, 564 S.W.2d 133 (Tex. Civ. App.-Beaumont 1978, writ ref'd n.r.e.), one who assumes a service of his own free will without an express or implied promise of remuneration is a volunteer, and not an employee.

In Burrell, cited by carrier, a claimant who showed up two or three days a week to work with his son on a logging site, and who received no pay but whose purpose was to have a job with his son when he retired in four years, was held not to be an employee as that term had been construed in prior cases. Likewise, in Associated Employers Lloyds v. Gibson, 245 S.W.2d 738 (Tex. Civ. App.-Eastland 1951, writ dism'd), an individual who showed up at a business establishment in the hopes of securing part-time work offered to fix a certain piece of machinery, to which the supervisor agreed. In determining there was no contract of hire, the court stated:

> The evidence is sufficient to show that appellee performed services for the Company on the occasion but we are of the opinion that it is insufficient to show that such services were performed under a contract of hire either express or implied. It is our opinion that remuneration is a necessary element in a contract of hire under the Workmen's Compensation Act.

In our opinion the facts of the instant case distinguish it from the true volunteers in Burrell and Gibson, who lacked even an implied promise of remuneration. Here, the claimant had had a preexisting employment relationship with the employer for which he previously had been paid remuneration; because of that, it appears unlikely that the parties' brief conversations regarding claimant's rehire did not contemplate that claimant would be paid by employer upon returning to work. As the court said in American Fire and Casualty Company v. Baker, 431 S.W.2d 956 (Tex. Civ. App.-Houston [1st Dist.] 1968, writ ref'd n.r.e.), "[t]he rule is well established in this state . . . that when an agent, with the authority of his principal, express or implied, employs help for the benefit of his principal's business, the relation of employer and employee between such help and the principal is thereby created and the question of whether the assistant or helper is promised any remuneration is immaterial."

Unlike this case, the question in Baker was not whether a contract of hire existed, but rather whether the claimant was the employee of the individual who hired him or of a development company. In the instant case, the issue concerned whether a contract of hire had been effected on the date of claimant's injury. The carrier essentially argues that Mr. E's words were insufficient to constitute an offer, but merely entailed the possibility of

claimant's rehire.

In Carnes v. Transport Insurance Co., 615 S.W.2d 909 (Civ. App.-El Paso 1981, writ ref'd n.r.e.) the court found no employment relationship where the claimant, in anticipation of employment with a trucking company, was injured while driving the truck to the prospective employer's yard for a prelease inspection. Despite the fact that the inspection was completed and the claimant hired two months later, the court held that at the time of the accident the claimant was a gratuitous worker, citing Gibson and Burrell, among other cases. The court also cited an Oklahoma case involving a workman denied compensation for injuries received on his way to report for his first day on the job, noting that "ordinarily a person's employment does not begin until he reaches his place of employment." *See* also Stoker v. Furr's, Inc., 813 S.W.2d 719 (Civ. App.-El Paso 1991, writ den'd), which held that a person who has contracted with an employer to begin work at some future time is not an employee until that time because he or she is not yet in the service of the employer or on the employer's payroll.

Unlike the facts in Carnes and Stoker, the claimant in this case was returning to work premises he had left some two weeks or less before, and was actively furthering of the affairs or business of the employer at the time he was injured. The carrier contends that employer had no right to control claimant; however, it appears to be undisputed that the claimant was performing tasks same or similar to those he performed at the time he was previously employed by employer, and there was no contention or evidence that the employer had no right of control at that time. Even in those cases where a written contract denies right of control, evidence of exercise of control by an employer and acquiescence therein by an employee will sustain a finding of right of control. And, "one claiming to have occupied the status of an employee makes a prima facie proof thereof when he shows that he was performing services peculiar to the alleged employer's business on the latter's property." Swift v. Aetna Casualty and Surety Company, 449 S.W.2d 818 (Tex. Civ. App.-Houston [14th Dist.] 1970, no writ). The claimant in this case not only was performing such services, but was doing so at the apparent direction--and certainly the knowledge--of one in a supervisory capacity.

Upon our review of the record, we are satisfied that the hearing officer's decision was not erroneous as a matter of law, and that it is supported by sufficient evidence. The hearing officer's decision is accordingly affirmed.

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Lynda H. Nesenholtz
Appeals Judge

CONCUR:

_____
Robert W. Potts
Appeals Judge

_____
Joe Sebesta
Appeals Judge